ANOTHER SUPREME COURT

With Appendix B

WILLIAM RENWICK RIDDELL

(Reprinted from The Washington Proceedings of the American Society for the Judicial Settlement of International Disputes, December, 1916)

With the Compliments of

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I want to protest in the first place about it being said that I have "come all the way from Canada" in order to speak to you. I can leave Toronto at 5.20 in the afternoon, and I can get here before noon the next day. When I was on the trial bench, very frequently I used to go up to part of the Province of Ontario (from which I come), eleven hundred miles away from Toronto (to Washington cannot be more than five or six hundred miles); I would leave Toronto at noon, and I would arrive at my destination two days thereafter. So, when you talk about "coming all the way," you forget that Canada, as well as Washington, is a place of magnificent distances.

At the first meeting of the Society in 1910, Mr. Alpheus Henry Snow read an interesting paper on the "Development of the American Doctrine of Jurisdiction of Courts over States." Premising by saying that "the American Colonists regarded the Colonies as commonwealths and free states," he went on to state that "they believed that the settlement of disputes between States

composing the English Empire . . . ought to be in charge of a specially constituted tribunal fitted by training to act judicially where the judicial method was applicable;" and he pointed out that that tribunal was the King-in-Council. That tribunal still exists and flourishes in full vigour, and it is that tribunal which I call "Another Supreme Court."

It is not intended here to reiterate what has been so well stated in Mr. Snow's address but rather to supplement it: nor shall I go largely into the history of this tribunal. All who are interested will find its history traced in an address before the Missouri Bar Association in 1909, published in the *American Law Review* for 1910, pp. 161–176.

Confining my remarks in great measure to the present and the recent, the first thing that is to be said is that this "Court" is not a court at all. The Judicial Committee of the Privy Council is simply a committee for special purposes of the Privy Council of the King.

In theory the King is the fountain of all justice throughout his dominions, and from time immemorial he has exercised jurisdiction in his Council which acts in an advisory capacity to the Crown. In theory also every subject has the right to submit his grievances to the King—"to seek the foot of the throne." Petitions of that nature which came before the King were after the development of Parliament referred in most part to Parliament which thus became the chief appellate tribunal. From early in the fourteenth century Receivers and Triers of petitions were appointed to relieve Parliament of clerical and routine work and to aid in the administration of

justice. These were of two classes, one for England and Ireland, the other for the remainder of the King's dominions. The petitions from England and Ireland went to Parliament, the original of the present appeal to the House of Lords, the others to the King in Council. It seems to be fairly certain that it was with appeals from Jersey and Guernsey that the King's Council began its regular exercise of the functions of a Court of Review.

But the Council did not confine its activities to the islands and territories beyond the seas: "it continued from time to time to exercise a kind of extraordinary and corrective jurisdiction to prevent violence, corruption or intimidation, and especially combination and conspiracy to obstruct or prevent the course of justice.

"But still much jealousy continued to be manifested from time to time at the exercise of this extraordinary jurisdiction by the ancient body—salutary and necessary as it in many cases undoubtedly was. At last it was thought proper to give statutory authority to its proceedings and a statute was passed in 1487 (3 Henry 7, c. 1). Before this Act the King's Council sat as a rule in the Star Chamber, and when the legislation came to be passed, it mentioned specifically 'the Court of Star Chamber.' This, as Hallam long ago showed, was a kind of Committee, that is a Judicial Committee, of the King's Privy Council. The Court of Star Chamber (as has been shown by recent investigation of its records, still extant) in many cases acted not as a statutory body at all but under the original Common Law Jurisdiction of the Privy Council; and indeed did not conceive of it-

self as being of statutory origin. Moreover, the Privy Council also continued at times and in certain cases, e.g., in cases of riot, to act outside of the Star Chamber and as the Privy Council had acted before the Statute. Whether the 'Court of Star Chamber' was a Court appears within a few years after the passage of the Act to have been questioned by the Common Law Judges; the great authority of Coke is that the judgment of these judges was 'a sudden opinion.' "

The court fell into disrepute in the Tudor and Stewart times and it was abolished in 1640 by the Statute 16 Car. 1, c. 10—but this Statute in no way affected the existing right and duty of the Council to hear appeals from English territory to which the Common Law writ did not run.

In 1667 a Committee of the Privy Council was formed to hear such appeals, a Judicial Committee, and such a Committee has continued to the present day. There has been legislation more than once but no change has been made in the status of the Judicial Committee. The members of the Committee are gentlemen who are members of the King's Privy Council and who are associated together for the purpose of listening to petitions from a private individual, a corporation, a Province, complaining of wrong. They are to advise His Majesty what he should do in the matter, but they are not Judges. They have of course the same power as any Court to rectify mistakes which have crept in by misprision or otherwise in embodying their judgment: Rajunderna-rain *vs.* Sing (1836) 7 Moore P. C. 117.

This body of gentlemen sits in a dull old room in a

building on the north side of Downing Street, Westminster, round a table in the middle of the room. They are not dressed as Judges with gowns, bands and wigs, but in the ordinary costume of an English gentleman. The number sitting to hear appeals is not fixed—I have seen four and I have seen seven (three exclusive of the President form a quorum.) One end of the room is raised—here are desks with pens (the villainous quill, of course) and ink for the Bar and the Solicitor. The barristers are all clothed in the conventional English style, black clothes, gown, wig and white bands, and when addressing Their Lordships, the Barrister stands opposite the end of the table at which the members of the Committee are sitting. Every English (and Canadian) Judge is "Your Lordship," "My Lord," but the Committee are addressed as "Your Lordships" not because the members are Judges, for they are not, but because they are members of the Privy Council.

But there is a more important consequence than that of clothes (*pace* Herr Teufelsdroeckh) following from the fact that the Committee is not a Court. The House of Lords is a Court and as a Court is bound by its own previous decisions; but the Judicial Committee is not so bound—it is not bound by any decision. Of course, its former decisions are treated with proper respect but the case is not without example that they have not been followed.

That reminds me of an incident that occurred when I was myself arguing before the Privy Council, and I mentioned a certain proposition of law. Lord Macnaghten said, "Where do you get that?" I replied, "I took that

from your Lordship's remarks in the argument of such and such a case." He asked, "Did I say that?" I answered, "I have the shorthand notes before me, and your Lordship is made to say that." He said, "If I said that, with very great respect for myself, I think I was wrong."

The present constitution of the Privy Council as a whole is not of much importance. It is never called together except in case of the demise of the Crown. Parliament has, however, taken into its own hands the constitution of the Judicial Committee. The Committee was formerly constituted by the Privy Council itself but that practice no longer obtains.

At the present time the Judicial Committee consists of the Lord Chancellor, the Lord President of the Council, all ex-Lords President, six Lords of Appeal in Ordinary, those members of the Privy Council who have held high judicial office (Lord Chancellor, member of the Judicial Committee, Lord of Appeal in Ordinary or Judge of a Superior Court in England, Ireland or Scotland) and seven from the Dominions overseas.

The present Chancellor is Lord Buckmaster (at least he was yesterday; I do not know whether he is to-day), long an active and successful practitioner at the English Bar. He was Solicitor General on the resignation of Lord Haldane in 1915, and on Sir John Simon the Attorney General declining to accept the Woolsack (as he preferred to remain in the House of Commons and active politics) Buckmaster received the prize of the profession.

Former Lords Chancellors are the Earl of Halsbury, over ninety-one years of age, but still vigorous physi-

cally and mentally and paying the debt which every lawyer owes to his profession by editing the *Cyclopaedia of the Laws of England*, and the Earl Loreburn who as "Bobby Reid" was a tower of strength to the Gladstonian party, as charming a companion (*crede experto*) as he is accomplished as a lawyer. There is also the acute and metaphysical Viscount Haldane whom many Americans remember with admiration addressing the American Bar Association in Montreal a few years ago. Then come the Scot, Andrew Graham Murray, Lord Dunedin, sometime Lord Advocate and then Lord Justice General of Scotland, the Irishman John, Lord Atkinson, formerly the brilliant Attorney General for Ireland, another Scot, Lord Shaw of Dunfermline formerly Solicitor General and Lord Advocate for Scotland—these two Scotsmen are no unworthy successors of Lords Watson and Robertson now no more.

Lord Mersey (Sir John Bigham) of fame and power in Admiralty cases and Lord Moulton better known as Lord Justice Fletcher Moulton, a man of great and accurate scientific knowledge, Director General of Explosives Supply, a F.R.S. and F.R.A.S. come next. Then Lord Parker, who came to the Council after seven years' experience as a Judge of the High Court of Justice, and Lord Sumner who had only three years' experience on the Bench, Lord Parmoore deeply versed in ecclesiastical matters, Lord Wrenbury who as Mr. Buckley was an authority on Company Law and lost none of his repute when he became Mr. Justice and Lord Justice Buckley, and Sir Arthur Channell also came from the High Court of Justice. There are other British mem-

bers ex officio whom I do not wait to name; they seldom if ever take part in the hearing and decision of appeals.

Let us leave now the list from the Mother Country and see who come from across the seas. We find Sir Samuel Griffith, Chief Justice from Australia, Sir Edmund Barton also from Australia, Sir Charles Fitzpatrick, Chief Justice of Canada, Sir James Rose-Innes, Chief Justice of South Africa and Sir Lawrence Jenkins formerly a Chief Justice in India. But the list is not exhausted; Syed Ameer Ali, a Mohammedan claiming to be a Syed in fact. that is, a descendent from Mohammed and glorying in his faith and race, has been for many years a member of the Committee.

"When there is an Ecclesiastical appeal, Archbishops and Bishops also sit—as ecclesiastical assessors; in the rare case of an appeal from beyond the seas in an admiralty matter, Admirals or other naval officers sit as naval assessors. For example in the well-known case, Read *vs.* Bishop of Lincoln (1892, A. C. 644) the Bishops of Chichester, St. Davids and Lichfield sat; and in a case from his Majesty's Supreme Court for China and Corea in 1908 (A. C. 251) Admiral Lloyd and Commander Caborne."

What are the functions of this extraordinary body?

"At the present time this Judicial Committee hears appeals in English cases only in Ecclesiastical matters. Upon every appeal of this character, at least three Bishops must sit as assessors, under the provisions of a rule made in 1876. The ultimate appeal in other matters from England goes to the House of Lords. In Scottish and Irish matters the Committee does not exercise any appel-

late jurisdiction whatever. But from Courts all over the world wherever the map is marked with red, come appeals. In Europe, from the Channel Islands, the Isle of Man, Gibraltar and Malta as well as from Cyprus; in Africa from the Cape of Good Hope, Natal, the Transvaal, the former Free States, the Gold Coast, Sierra Leone, Zululand, Rhodesia, St. Helena, Lagos, Basutoland, Bechuanaland, the Falkland Islands, Mauritius, Gambia, Griqualand and other 'lands', more or less unknown; in Asia from Bombay, Calcutta, Madras, the N. W. Territory, Aden, Assam, Beluchistan, Burmah, Upper and Lower Oudh, Punjaub, Ceylon, Mauritius, Hong Kong, Borneo, Labuan; in Australasia, Australia, New Guinea, Fiji, New Zealand, Norfolk and Pitcairn Islands and in America from Canada and her Provinces—Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island, Manitoba, Saskatchewan, Alberta, British Columbia and from Newfoundland, Bermuda, the Bahamas, Jamaica, British Honduras, and from Guiana in South America and many another British Island lying in that Carribean Sea.

The laws of a score of self governing communities must be interpreted; the English Common Law of the English-speaking colonies modified by local Statutes in Quebec the Coutume de Paris with similar modification, the many varying and various laws of the many East Indian peoples, the Roman Dutch law of the South of Africa, the still more complex law of Malta—all these and more come before that assembly of jurists."

There have been many decisions by the committee in disputes between man and man—decisions of the greatest moment and the most far reaching character.

I do not however dwell upon private litigation. No small part of the labors of the Judicial Committee has been the decision of what in the United States are called constitutional questions. The word "constitutional" has not the same connotation with us as with you. In the American sense "constitutional" means in accord with the written "constitution." With us it means in accord with the more or less vague principles upon which we conceive government should be carried on. With you what is unconstitutional is illegal however just and laudable it may be, with us that is unconstitutional which is wrong however legal it may be.

It was decided in re Bedard (1849) 7 Moore P. C. 23, that the Governor of a Colony like Canada represented Her Majesty and had power (e.g.,) to grant a patent of precedence to a newly appointed judge. But the power of a Colonial Governor in Council must be exercised in (substantially) the proper and regular way. Sometimes a Judge has been "amoved" by the Colonial authorities and reinstated by the Judicial Committee because unjustly treated by being deprived of a right to be heard. Sometimes in such a case the "amotion" has been sustained. In Montague *vs*. Lieutenant Governor Van Dieman's Land (1849) 6 Moore P. C. 489, the Judge was called on to show cause against an order for suspension only and he was amoved. The Committee held that the irregularity did not prejudice him and sustained the order of amotion. I shudder to think what would happen if an American Court were to decide the same way.

There are very many cases dealing with the power of a Colonial Parliament to punish for contempt. A com-

paratively late instance is Doyle vs. Falconer (1866) L. R. 1 P. C. 328. Some of these point out that the Colonial Parliament is not a Court like the Imperial Parliament as it has no judicial functions. But that the power of punishing for contempts which tend to obstruct its proceedings and directly to bring its authority into contempt is inherent in every Supreme legislative authority is affirmed by such cases as Beaumont vs. Barrett (1836) 1 Moore P. C. 59.

Since the Governor in Council is not quite the King-in-Council and the Colonial Parliament is not quite the Imperial Parliament, there will sometimes arise a question of the limits of legislative power in the local Parliament, and such cases have been coming before the Committee with great frequency. Occasionally the question may require the elucidation of the common law powers of the Imperial Parliament, as for example as in Devine vs. Holloway (1861) 14 Moore P. C. 290, where the effect of a demise of the Crown came under consideration.

But in every case the extent of the power granted to the local Parliament must be looked at, and it has been uniformly held that a local Parliament acting within the ambit of the limits prescribed for it "is not in any sense an agent or delegate of the Imperial Parliament but has plenary powers as large and of the same nature as those of Parliament itself," The Queen vs. Burah (1878) 3 A. C. 889 at p. 904; and consequently it can delegate its powers, etc., which no mere agent could do. Hodge vs. the Queen (1883) 9 A. C. 117 at p. 132.

These powers must be restrained strictly within the limits prescribed. The Dominion Parliament has "Crim-

inal Law" for one of its objects but that does not enable it to make into a crime an act committed outside of the Dominion as the Imperial Parliament could, Rex vs. Brinkley (1907) 14 O. L. R. 434.

I heard stated this morning something that startled me more than anything else in the whole course of my legal career, namely, that the Judicial Committee of the Privy Council has been declaring certain laws passed by local legislatures void as against justice and common right. I have been practising law a great many years, and I have never found such a case.

What the Judicial Committee of the Privy Council does is this. It looks at the Imperial statute by which the local legislature is formed. It finds out the powers which are given by that statute, and if any powers in that statute are exercised, the Judicial Committee never considers whether such exercise is just or right or honest. I shall give you an example.

Not so very long ago, before I went in the Appellate Division, and was sitting on the trial bench, I had occasion to try a case, the Florence Mining Company vs. Cobalt. The Florence Mining Company claimed the ownership of certain mining lands. The Parliament of Ontario, the Legislative Assembly—we have only one House there, and that is enough for us; we are too busy up in Ontario, and too poor, to be bothered with two Houses. I may say that in seven out of nine provinces in Canada they have only one House, two of the provinces still retaining their two Houses; but we in Ontario cannot be bothered with two, as I said.

Well, the legislature of the Province of Ontario passed

an Act saying that the land should belong to the Cobalt Mining Company, mentioning the particular land. The action was brought by the Florence Mining Company against the Cobalt Company, and tried before myself. I went into the facts fully, tried out the facts in the sense of hearing all the facts. I thought it fairly well proved that the land was the property of the plaintiffs originally and before that Act. But I decided that the prohibition, "Thou shalt not steal" does not extend to the sovereign legislature, and I said so in just those blank, bald, words. I decided that the legislature had the right and power of taking that property, even if admittedly of A, and saying that it should be the property of B.

Now, a more gross thing than that, absolutely against all common right, nobody could think of, nobody could conceive of. I refused to pass upon the facts; I said, "I shall assume the plaintiffs have proved their case. I shall decide this upon the constitutional question."

It went to the Court of Appeal; the Court of Appeal went into the facts very fully and decided against the plaintiffs on the facts, but at the same time the Court of Appeal said that the law constitutionally laid down by the learned trial judge was unexceptional and perfectly good law.

That went to the Privy Council, and the Privy Council upheld this decision on both grounds. They said that even if the plaintiffs had proved their case the legislature of the Province of Ontario had the power to take away the property of one person and give it to another.

What the Judicial Committee has done (I venture to think), in all those cases to which my friend has alluded,

has been to go carefully into the Acts of the legislature; that they have gone into the charter of the Province, if you please to use that terminology, and have investigated what power that charter has given to the legislature. They have decided in more than one case, no matter how small a legislature it may be, even of the smallest British island in the world, that so long as the legislature is acting within the ambit, within the four corners of the power which is given to it by the Imperial House, they have the power to do as they please, steal, or anything else they see fit.

In our system it is the people who are the ultimate court of appeal. If the Government did any stealing the matter would come before the people at the next election, and if the people wanted a government that stole, I suppose the people would return the government at the next election. But it is highly probable that if the government did anything of that kind, there would be such a cry raised that it would not be continued. I want you to understand that we are not a larcenous people naturally.

It is at once manifest the very large number of cases which involve the extent of the powers of the Colonial Legislature. In Canada the question has been for nearly half a century complicated by the division of legislative power between Dominion and Provinces. The British North America Act of 1867, sometimes called the written constitution of Canada, sets out fully the objects of legislation of Dominion and Province respectively. The judicial interpretation of this Act has called out the greatest ingenuity and learning from the Com-

mittee and Counsel, and the end is by no means yet. The same sort of dispute may be expected in Australia now federated.

In addition to determining whether this or that legislation is *intra* or *ultra vires* ("constitutional" or "unconstitutional" in the American terminology) questions have arisen more like disputes between States.

In the British North America Act in addition to the division of legislative functions, there is a division of property between Dominion and Province—and it must be remembered that a gift of legislative power concerning any property is not a gift of the property itself. Attorney-General (Dominion) vs. Attorney-General (Province) 1898, A. C. 700, at pp. 709-711.

Many disputes concerning property have come before the Judicial Committee and it has always been considered that such disputes are to be decided on a rule or principle of law and not on what might be thought fair. Dominion of Canada vs. Province of Ontario, (1910) A. C. 637.

The Judicial Committee decides the law; it has no hesitation, if necessary, in changing its action. It has said in at least two cases that, "What we said on such an occasion is not law; we were mistaken. The law is so and so" and they decide the law.

The Committee has been called on to decide the ownership of real estate of which the owner died without leaving heirs and without a will. This was allotted to the Province not to the Dominion, Attorney General Ontario vs. Mercer (1883) 8 A. C. 767.

An interesting case arose under the following circumstances. In 1763 certain tribes of Indians were granted

possession of certain lands as hunting grounds "for the present." In 1873 the Indians surrendered this land; (we have had no trouble with Indians—no "H. H." can write a "Century of Dishonor" concerning Canada) and the question arose who should own it. The Judicial Committee supported the claim of the Province and affirmed the decision of the Canadian Courts—St. Catharines Milling & Lumber Co., vs. The Queen (1888), 14 A. C. 46—the same kind of question arose in a later case which I do not stop to discuss. Attorney General (Dominion) vs. Attorney General Ontario (1897) A. C. 199.

British Columbia came into the Dominion in 1871 on the express bargain that the Canadian Pacific Railway should be built across Canada. The land was owned by the Province. The Province granted to the Dominion lands 20 miles on each side of the Canadian Pacific Railway's line, so that the Dominion could give that to the Canadian Pacific Railroad as a bonus for building the road. It turned out that there were precious metals in and under part of this land. The Dominion claimed them, but the Committee held that precious metals, gold, and so on, are not incidents of land but belong to the Crown, and therefore like other royalties, belong to the Province. Attorney-General (B. C.) vs. Attorney-General (Canada) (1889) 14 A. C. 295. So we have the fact of land solemnly granted by the Province to the Dominion, but that grant did not carry the royalty—that is, the precious metals which were in and under that land.

The ownership of fisheries and fishing rights, of rivers and lake improvements, and of harbours was strongly

contested and was decided by the Committee, Attorney General (Dominion) vs. Attorney General (Provinces) (1898) A. C. 700.

Swamp lands in Manitoba were a matter of dispute and decision, Attorney General (Manitoba) *vs.* Attorney General (Canada) (1904) A. C. 199; the foreshore in British Columbia in Attorney General B. C. P. R. C. *vs.* 1906) A. C. 204; water-rights in the railway belt in British Columbia in Burrard P. Co., etc. *vs.* The King, (1911) A. C. 87, and fishing rights in the same Province Attorney General (B. C.) *vs.* Attorney General (Canada) (1914) A. C. 153.

It will be seen that the curious situation has not infrequently arisen of land or other property situated within a particular Province being claimed as its own by the Dominion; and indeed all property in the Dominion must be in some Province or another (except such as is in the Yukon and other non-provincial territories).

Since the public property of the whole of the British dominion is in the King, it would seem odd that the King in one capacity would be at law with himself in another, but there is no practical difficulty. When a dispute arises we make the Attorney General of the Dominion party of the one part and the Attorney General of the Province party of the other part.

Another dispute, a dispute between two provinces, is not unlike certain of the disputes which have come before the Supreme Court of the United States:

"By the British North America Act (1867), the Province of Ontario was given the same limits as the former Province of Upper Canada. Ontario always claimed

practically the whole district west of Lake Superior to the Rocky Mountains. She claimed originally up to the South Sea, but she limited her claim ultimately to the Rocky Mountains. And there is a great deal of authority, too, for the supposition that the old Province of Upper Canada went as far west as the Rockies.

"In 1870 by the Dominion Act, 33 Vic. c. 3, the Province of Manitoba was formed with its eastern boundary at the meridian of 96° W. L. At once there was a movement in Ontario, the Government of that Province claiming that it went further West than 96° W. L. although this had long been considered in fact about her western limit. Many communications passed between the Governments, but without result. Then in 1876 an Act was passed (39 Vict. c. 21) extending the limits of Manitoba to the 'westerly boundary of Ontario.' You can see at once that trouble would arise. The Dominion and Manitoba claimed that the westerly boundary was about six miles east of Port Arthur, coming east about where Grand Portage, Minn., is on the shores of Lake Superior. Armed forces of the Provinces of Manitoba and Ontario took possession of Port Arthur, but the scandal was abated by an agreement to arbitrate, December 18, 1883, by the Dominion and Province. Ontario named William Buell Richards, Chief Justice of the Province, and when he became Chief Justice of Canada, his successor Robert A. Harrison, the Dominion, Sir Francis Hincks, and the two Governments jointly Sir Edward Thornton the British Ambassador at Washington.

"These arbitrators made, August 3, 1878, a unanimous award in favour of the Ontario contention, which by this

time was in reality limited to the generally recognized boundary. This was at once accepted by Ontario, but the Dominion refused to ratify the award. At length, in 1883, the two provinces concerned agreed to submit to the Judicial Committee of the Privy Council three questions (1) whether the award was binding, as the Dominion claimed that no government can bind the country to anything that requires an act of Parliament; (2) if not, what was the true boundary, and (3) what legislation was necessary to make the decision effectual.

"The Judicial Committee, August 11, 1884, decided (1) in the absence of Dominion legislation the award was not binding, (2) the award laid down the boundary correctly, and (3) Imperial legislation was desirable (without saying it was necessary).

"The Imperial Act (1889) 52 and 53 Vic. c. 28, carried the decision into effect, and ended the controversy."

I should like to add here some words of my own with which I closed the address to the Missouri Bar Association already mentioned:

"There have been occasions upon which suggestions have been made, more or less seriously, that the jurisdiction of the Privy Council over self-governing communities, such as we have in Canada and as are in Australia and New Zealand, should cease. For example when the Supreme Court of Canada was established in 1875, there was considerable discussion looking to the abolition of the right to appeal to the Privy Council from the Court so established. Wiser counsels prevailed and no attempt was made to prevent such appeals by legislation. Now an appeal lies as of right from the highest court in each

Province in cases of sufficient magnitude and also by special leave from the Supreme Court of the Dominion.

"No feeling exists that this should be altered—occasionally of course the unsuccessful party to an appeal, and those who sympathize with him make a doleful noise against the Board but this speedily dies out.

It is wholly beyond controversy that Canadians generally would deplore any attempt to interfere with their traditional right to apply for justice to the foot of the throne.

"In other colonies the right continues in a more or less complete form—and from all appearances will so continue while the British Empire itself continues—and may that be not *ad multos annos alone*, but *in aeternum*."

Whatever may be the case in respect of private litigation, it seems to me that the Judicial Committee will have forever the task of determining controversies between the integral parts of the Empire.

APPENDIX B

THE HISTORY OF THE PRIVY COUNCIL AS A LEGAL TRIBUNAL OR COURT

[NOTE: After the reading of the paper "Another Supreme Court," Mr. Justice Riddell was requested by the Association to supplement the paper by an account of the history of the Privy Council as a Court—the following is accordingly furnished.]

The King's Privy Council is a "Common Law" body, that is, it was formed by a process of evolution when the common law of England was in the making and not *uno ictu* by decree of Monarch or Act of Parliament.

The precise origin of the Privy Council is of little importance, historically or otherwise: we know that before times which are in the full sense historical the King could not see to it personally that all his subjects had justice done to them; and he had therefore the assistance of a body of men chosen by himself, a Council.

To this Council was entrusted the administration of justice; in course of time, formal courts were formed from the Council, the Courts of King's Bench, of Exchequer, of Common Bench, with special functions and apparatus for the performance of these functions. But thereafter there remained no inconsiderable part of the original jurisdiction of the Council unallotted and this continued to be the case on the crystallization of the Court of Chancery. The Privy Council continued from time to time to exercise "a kind of extraordinary and corrective jurisdiction to prevent violence, corruption or intimidation; and especially combination and conspiracy to obstruct or prevent the course of justice."

This was the case before the creation of the Court of Star Chamber in 1487 by 3 Henry VII, c. 1, the name of the Court being taken from the Chamber wherein the Council was accustomed to sit—the Court of Star Chamber, as Hallam points out, was in fact a Judicial Committee of the Privy Council.

After the statute, the Privy Council continued to sit on occasion under its original Common Law jurisdiction and quite independently of the statute: but most of the business was done in the statutory court.

The Court of Star Chamber was abolished in 1640 by the act 15 Car. I, c. 10, which provided that neither the King nor the Privy Council should have jurisdiction over the estates of any of the subjects of the kingdom but that all questions respecting the same should be tried and determined by the ordinary course of law in the ordinary courts.

But this Act of the Long Parliament dealt only with subjects of the Kingdom and not at all with subjects of the King in territory without the Kingdom: and any subject in a dependency had still his right to apply to the King in Council as before. Moreover at the Common Law the original jurisdiction to decide cases "relating to the boundaries between provinces, the dominion and proprietary government is in the King and Council," as Lord Chancellor Eldon says in the famous case of Penn v. Lord Baltimore (1750) 11 Vesey Sr., 444 at p. 446. This jurisdiction was not at all interfered with by the Act of 1640.

It does not seem to be quite certain when appeals came first to the Council from non-English territories of the King of England; but apparently it is practically certain that they came from the Channel Islands. Until the seventeenth century the foreign dependencies were not of great importance; but in that century appeals are found coming in; and in 1667 a special Judicial Committee was formed by the Privy Council from its members to deal with such appeals. This was without any authority from Parliament, for none was needed, the authority of the Common Law being sufficient.

After the Revolution of 1688 the appeals began to increase, and in 1691 an order was passed that "all appeals be heard as formerly by the Committee who are to report the matters so heard by them and with their opinion thereon to the King in Council." This "Committee for Appeals" had jurisdiction over appeals from the supreme courts of the Colonies. Early in the eighteenth century Colonial appeals began to come in in considerable numbers: and many most important matters were passed upon by the Committee.

The celebrated Penn v. Lord Baltimore case already referred to was in fact to determine the rights of Pennsylvania and Maryland over part of the present Delaware: but it was arranged that the matter should be tried as a civil suit in Chancery: this was done: and the King in Council made an order in accordance with Lord Hardwicke's decision. But this case can not be cited as an instance of judicial power.

While there are many instances of the decision by the Committee in Colonial times on private litigation, I am not aware of the exercise of judicial power in any public controversy, e.g., of boundary, etc. (Mr. Snow's valuable address at the first meeting of this Society should be consulted.)

Indian appeals stand on a peculiar footing: the right to appeal was first given in 1773, 16 George III, c. 63. Turning now to another jurisdiction of appeal we note that originally within England appeals, so far as they were allowed at all from the Courts of Law, went to the Court of Error, or to the Lords—from the admiralty to the King in Chancery, that is in practice to a Court of Delegates and from the Ecclesiastical Court to the Pope, that is in practice to Delegates appointed by the Pope. After the Reformation in 1532 (24 Henry 8, c. 12) appeals to Rome were forbidden; and the next year (25 Henry 8, c. 17) it was provided that appeals from the Archbishop's Court should be to the King in Chancery—he appointed Delegates forming a High Court of Delegates to hear these appeals.

In 1832 (by 2 and 3 Wm. 4, c. 92) the appeals in Ecclesiastical matters which since the Reformation had been to the High Court of Delegates, as well as appeals in Admiralty were transferred to the King in Council. The following year the statute 3 and 4 Wm. 4, c. 41 was passed which regulated the constitution of the Judicial Committee for the hearing of appeals—which Committee was to consist of the Lord President of the Council, the Lord Chancellor, and such members of the Privy Council as shall hold the office of the Lord Keeper, First Lord Commissioner, Lord Chief Justice, Lord Chief Baron, Master of the Rolls, Vice-Chancellor of England, Judge of the Prerogative Court, Judge of the Admiralty, the Chief Judge in Bankruptcy, and all Privy Councillors who shall have held any of these offices—to which the King by sign manual might at any time add two other Privy Councillors.

By the same Statute of 1833 it was provided that all appeals from the Admiralty, Vice-Admiralty, or other Courts abroad which theretofore had lain to the High Court of Admiralty in England should be to the King in Council.

By the Act of 1832 (2 and 3 Wm. 4, c. 92) the appeals which in Admiralty cases had from even before the 25th Henry 8, gone to the King in Chancery and so were heard by the Court of Delegates, were transferred to the King in Council. So by 1833, we have the King in Council vested with the statutory powers of hearing Admiralty and Ecclesiastical appeals, and still continuing to exercise a power which did not depend upon Statute of supervising the proceedings of all Courts in the British Dominions not within the four seas. All these appeals—all appeals to the King in Council—were to be referred to the Judicial Committee who were to report to His Majesty in Council. By this Act two ex-Judges from India or beyond the seas were also provided for. Further Ecclesiastical appeals were provided for in 1840 (3 and 4 Vic., c. 86); this act also got rid of an anomaly—Ecclesiastical appeals could theretofore have been heard without a single Bishop or Ecclesiastical Judge being upon the Committee—this Act provided that every Archbishop and Bishop of the United Church of England and Ireland who should be a member of the Privy Council should be a member of the Committee for the hearing of such appeals and one at least be present. Another Ecclesiastical appeal is given in 1874 (37 and 38 Vic., c. 85) and in 1846 (27 and 28 Vic., c. 21) an appeal is given in prize cases. In 1871 (34 and 35 Vic., c. 91) provision was made for four Judges or ex-Judges of the Courts at Westminster or in India being appointed.

Then came the Supreme Court of Judicature Act of 1873, whereby all Admiralty appeals were taken away from the Committee; and in 1876 the provision was made for four Lords of Appeal in ordinary at a salary of £8000 each to sit in the House of Lords and, if Privy Councillors, also in the Judicial Committee.

In 1877, all jurisdiction on the part of the Queen in Council in matters of appeal from Ireland was abolished. In 1895 a very important provision was made that any Judge or ex-Judge of the Supreme Court of Canada or any

Superior Court in any Province of Canada, of Australia, New Zealand, Cape of Good Hope or Natal, who should be a Privy Councillor should also be a member of the Judicial Committee.

At the present time this Judicial Committee hears appeals in English cases only in Ecclesiastical matters. Upon every appeal of this character, at least three Bishops must sit as assessors, under the provisions of a rule made in 1876. The ultimate appeal in other matters goes to the House of Lords. In Scottish and Irish matters the Committee does not exercise any appellate jurisdiction whatever.

After many centuries of self-government by the Privy Council, Parliament took it in hand to constitute the Judicial Committee itself in 1833 by 3 and 4 Will. IV c. 41; the statute directed who should form the Committee, the appointment of a Registrar and generally laid down regulations. Since that time the Judicial Committee has been purely statutory, and the Privy Council has not been in that regard *imperium in imperio*. Most of the subsequent legislation deals with the constitution of the Judicial Committee and is not of interest to Americans.

Those desiring precise information may look at the Statutes: 7 and 8 Vict., c. 69, s. 9; 14 and 15 Vict. c. 83, s. 16; 39 and 40 Vict. c. 59, ss. 6, 14; 44 and 45 Vict. c. 3; 50 and 51 Vict. c. 70, s. 4; 58 and 59 Vict., c. 44; 8 Ed. VII, c. 51; 3 and 4 Geo. V, c. 21.

An interesting account of the Court of Star Chamber, etc., will be found in the Introductions to two volumes of the Selden Society Seria viz: "Select Cases before the King's Council in the Star Chamber, etc.," (1903), Vol. XVI, (1910), Vol. XXV, in which the motto περὶ παντὸς τὴν ἐλευθερίαν is honoured in the observance; Anson's "Law and Custom of the Constitution" has short but accurate references; Lord Eustace Percy's "The Privy Council under the Tudors" is interesting but not helpful for our particular purpose; Wood Renton's pamphlet on "The Conditions of Appeal from the Colonies to the Privy Council" is valuable, as of course are Pownall's "Administration of the Colonies;" Macqueen, "Appellate Jurisdiction of the House of Lords and of the Privy Council," and (the second edition of) Bowyer's "Commentaries on the Constitutional Law of Enlgand." Dicey's "The Privy Council" can scarcely be considered worthy of that very eminent legal writer; my own address before the Missouri Bar Association will be found in the American Law Record for 1900, and no one can ever safely neglect Blackstone.

William Renwick Riddell.